

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HEIDI NOEL KELLER,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

CASE NO. C15-05266 BHS

ORDER AFFIRMING DENIAL  
OF BENEFITS

**I. BASIC DATA**

Type of Benefits Sought:

(X) Disability Insurance

( ) Supplemental Security Income

Plaintiff's:

Sex: Female

Age: 25 at alleged onset date

Principal Disabilities Alleged by Plaintiff: Lumbar fusion (back problems), depression, spinal cord problem, muscle spasms, anxiety.

1 Disability Allegedly Began: May 5, 2005

2 Principal Previous Work Experience: Dialysis Tech, CNA/Phlebotomist, Customer  
3 Service Associate, Pizza Maker.

4 Education Level Achieved by Plaintiff: At least high school.

## 5 **II. PROCEDURAL HISTORY—ADMINISTRATIVE**

6 Before ALJ Rebekah Ross:

7 Date of Hearing: July 19, 2013,<sup>1</sup> hearing transcript AR 65–96.

8 Date of Decision: July 31, 2013

9 Appears in Record at: AR 25–47

10 Summary of Decision:

11 The claimant meets the insured status requirements of the Social  
12 Security Act through December 31, 2010. The claimant has not  
13 engaged in substantial gainful activity since May 5, 2005, the  
14 alleged onset date. The claimant has the following severe  
15 impairments: failed back syndrome status post fusion; obesity;  
16 tobacco use disorder; and depression. Her impairments, even in  
17 combination, do not qualify under the Listings.

18 The claimant has the residual functional capacity to perform light  
19 work. She needed a sit and stand option with changes in position  
20 ever 30 minutes. She could occasionally stoop, kneel, crouch, and  
21 crawl. She could never climb ladders, ropes or scaffolds. She  
22 needed to avoid concentrated exposure to vibrations and hazards  
such as machinery and heights. She was limited to unskilled work  
with simple repetitive tasks. She would have been off task five  
percent of the workday. She needed one sick day per month.

The claimant cannot perform any of her past relevant work.  
Considering the claimant's age, education, work experience, and  
residual functional capacity, the claimant is capable of making a

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<sup>1</sup> A hearing was scheduled for January 7, 2013, but it was postponed in order for Keller to  
obtain counsel. AR 49–64.

successful adjustment to other work that exists in significant numbers in the national economy. A finding of “not disabled” is therefore appropriate.

Before Appeals Council:

Date of Decision: March 17, 2015

Appears in Record at: AR 1–6

Summary of Decision: Declined review

### III. PROCEDURAL HISTORY—THIS COURT

Jurisdiction based upon: 42 U.S.C. § 405(g)

Brief on Merits Submitted by (X) Claimant (X) Commissioner

### IV. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), the Court may set aside the Commissioner’s denial of Social Security benefits when the ALJ’s findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005). “Substantial evidence” is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the ALJ. *See Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). “Where the evidence is susceptible to more than one

1 rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion  
2 must be upheld." *Id.*

### 3 **V. EVALUATING DISABILITY**

4 The claimant, Heidi Keller ("Keller"), bears the burden of proving she is disabled  
5 within the meaning of the Social Security Act ("Act"). *Meanel v. Apfel*, 172 F.3d 1111,  
6 1113 (9th Cir. 1999). The Act defines disability as the "inability to engage in any  
7 substantial gainful activity" due to a physical or mental impairment which has lasted, or  
8 is expected to last, for a continuous period of not less than twelve months. 42 U.S.C.  
9 §§ 423(d)(1)(A), 1382c(3)(A). A claimant is disabled under the Act only if her  
10 impairments are of such severity that she is unable to do her previous work, and cannot,  
11 considering her age, education, and work experience, engage in any other substantial  
12 gainful activity existing in the national economy. 42 U.S.C. § 423(d)(2)(A); *see also*  
13 *Tackett v. Apfel*, 180 F.3d 1094, 1098–99 (9th Cir. 1999).

14 The Commissioner has established a five-step sequential evaluation process for  
15 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R.  
16 §§ 404.1520, 416.920. The claimant bears the burden of proof during steps one through  
17 four. *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). At  
18 step five, the burden shifts to the Commissioner. *Id.*

### 19 **VI. ISSUES ON APPEAL**

- 20 1. Did the ALJ err in assessing Dr. Gritzka's opinion?
- 21 2. Did the ALJ err in assessing Dr. Southwell's opinions?
- 22 3. Did the ALJ err in assessing lay evidence?

1 4. Did the ALJ err in assessing claimant's credibility?

2 5. Did the ALJ err in determining claimant's residual functional capacity?

### 3 VII. DISCUSSION

4 Keller appeals the Commissioner's decision denying her disability benefits,  
5 arguing the ALJ committed several errors requiring reversal. Dkt. 15. The Court  
6 addresses each alleged error in turn.

#### 7 A. Dr. Gritzka's Opinion

8 Keller first challenges the ALJ's evaluation of Dr. Gritzka's opinion. *Id.* at 4–7.  
9 Dr. Gritzka reviewed the medical record and performed an orthopedic examination of  
10 Keller in April 2013, approximately two years after Keller's date of last insured. AR  
11 959–71. Dr. Gritzka opined that since the alleged onset date, Keller “has not, on a more  
12 probable than not basis, been able to engage in work even at the sedentary level, eight  
13 hours a day, five days a week.” AR 966. Dr. Gritzka further opined “the combination of  
14 [Keller's] medical impairments would probably have resulted in absenteeism of more  
15 than three days per month on a more probable than not basis.” AR 966–67. The ALJ  
16 gave little weight to Dr. Gritzka's opinion. AR 39.

17 “There are three types of medical opinions in social security cases: those from  
18 treating physicians, examining physicians, and non-examining physicians.” *Valentine*,  
19 574 F.3d at 692. “As a general rule, more weight should be given to the opinion of a  
20 treating source than to the opinion of doctors who do not treat the claimant.” *Lester v.*  
21 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ must provide “clear and convincing”  
22 reasons for rejecting the uncontradicted opinion of a treating or examining physician. *Id.*

1 When the evidence in the record contradicts a treating or examining physician's opinion,  
2 the ALJ must give "specific and legitimate reasons supported by substantial evidence in  
3 the record" for discounting the opinion. *Id.* (internal quotation marks omitted). "The  
4 ALJ can meet this burden by setting out a detailed and thorough summary of the facts and  
5 conflicting clinical evidence, stating his interpretation thereof, and making findings."  
6 *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986).

7 The ALJ provided two reasons for discounting Dr. Gritzka's opinion. First, the  
8 ALJ found Dr. Gritzka's opinion was "inconsistent with the clinical findings of medical  
9 providers and examiners during the time period at issue." AR 39. In reaching this  
10 conclusion, the ALJ detailed clinical findings from orthopedic surgeon Dr. Jones,  
11 neurologist Dr. Kooiker, and family physician Dr. Little, which showed Keller could sit  
12 comfortably, walk with a normal-based gait, stand without difficulty, and had good  
13 mobility in her lumbar spine. *See id.* (citing AR 485–87, 579, 603, 605). Second, the  
14 ALJ found Dr. Gritzka's opinion did not account for medical evidence showing Keller's  
15 condition deteriorated after the date of last insured. *Id.* The ALJ noted Keller's lumbar  
16 flexion was ninety degrees in March 2011. *Id.* (citing 789). Two years later during Dr.  
17 Gritzka's examination, Keller's lumbar flexion was forty degrees. AR 964. Dr. Gritzka  
18 nevertheless opined Keller had the same functional limitations from May 2005 through  
19 April 2014. AR 966.

20 These are specific and legitimate reasons supported by substantial evidence for  
21 discounting Dr. Gritzka's opinion. *See Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d  
22 1190, 1195 (9th Cir. 2004) (holding ALJ may discount a medical opinion that is

1 inconsistent with other medical findings). Although Keller recounts additional facts in  
2 the record, the interpretation of evidence is within the ALJ's purview. *See Thomas*, 278  
3 F.3d at 954 ("Where the evidence is susceptible to more than one rational interpretation,  
4 one of which supports the ALJ's decision, the ALJ's conclusion must be upheld."). The  
5 Court concludes the ALJ did not err.

6 **B. Dr. Southwell's Opinions**

7 Next, Keller argues the ALJ erred in evaluating Dr. Southwell's opinions. Dkt. 15  
8 at 7–9. Dr. Southwell is an occupational physician who treated Keller between May 2005  
9 and June 2006. AR 697, 720. In May 2005, Dr. Southwell opined that Keller could lift  
10 ten pounds and should spend less than two hours sitting, standing, or walking before  
11 lying down. AR 698. The ALJ gave this opinion little weight because it was not  
12 supported by objective findings. AR 38. In 2006, Dr. Southwell opined that Keller could  
13 not return to her job at injury. AR 714, 720. The ALJ gave this opinion little weight  
14 because it was not supported by objective findings and was inconsistent with the opinions  
15 of Drs. Jones and Kooiker. AR 38.

16 Having reviewed the record, the Court finds the ALJ did not err in evaluating Dr.  
17 Southwell's opinions. The ALJ provided specific and legitimate reasons supported by  
18 substantial evidence for discounting the doctor's opinions. As discussed above, the ALJ  
19 need not accept the opinion of a physician that is inadequately supported by clinical  
20 findings or inconsistent with clinical findings. *Batson*, 359 F.3d at 1195; *Thomas*, 278  
21 F.3d at 957.  
22

1 Even if the ALJ erred, Dr. Southwell ultimately concluded Keller could return to  
2 work. *See* AR 720 (“[Keller] understands that she is not released to her job at injury, but  
3 she will be released to a position which allows for in position as needed, not lifting  
4 anything heavier than 10 or 15 pounds.”). This opinion is consistent with the ALJ’s  
5 determination that Keller could not perform past relevant work, but could perform other  
6 work and therefore was “not disabled.” AR 40–41. Accordingly, any error in assessing  
7 Dr. Southwell’s opinions is harmless. *See Molina v. Astrue*, 674 F.3d 1104, 1111 (9th  
8 Cir. 2012) (“[A]n ALJ’s error is harmless where it is inconsequential to the ultimate  
9 nondisability determination.” (internal quotation marks omitted)).

### 10 **C. Claimant’s Credibility**

11 Keller also contends the ALJ erred in assessing her credibility. Dkt. 15 at 10–11.  
12 Keller alleged various functional limitations related to her spinal issues, including the  
13 inability to stand and sit for long periods of time. *See, e.g.*, AR 83, 87, 293, 298–99, 305.  
14 During the hearing, Keller testified she can stand for about 10 to 15 minutes at a time,  
15 and can sit for 25 to 30 minutes at a time. AR 83. Keller also testified she lies down at  
16 least three times per day for 40 minutes to 3 hours at a time. AR 87. The ALJ found  
17 Keller’s testimony regarding the severity of her symptoms to be not fully credible for six  
18 reasons. AR 37–38.

19 Absent evidence of malingering, the ALJ must provide clear and convincing  
20 reasons to reject a claimant’s testimony about the severity of her symptoms. *Lingenfelter*  
21 *v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). “General findings are insufficient; rather,  
22 the ALJ must identify what testimony is not credible and what evidence undermines the



1 claimant's complaints." *Lester*, 81 F.3d at 834. "In weighing a claimant's credibility, the  
2 ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony  
3 or between his testimony and his conduct, his daily activities, his work record, and  
4 testimony from physicians and third parties concerning the nature, severity, and effect of  
5 the symptoms of which he complains." *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th  
6 Cir. 1997).

7 The ALJ did not cite any evidence of malingering; therefore, the clear and  
8 convincing standard applies. The Court finds the ALJ provided several clear and  
9 convincing reasons for discounting Keller's testimony. For example, the ALJ determined  
10 Keller's allegations were inconsistent with the medical evidence. AR 37. The ALJ also  
11 noted Keller failed to follow treatment recommendations, and the record evidenced  
12 exaggerated symptoms and limitations. AR 38. These reasons are supported by  
13 substantial evidence in the record, which the ALJ discussed at length. *See* AR 37–38.  
14 Because the ALJ provided legally sufficient reasons for discounting Keller's testimony,  
15 the ALJ did not err.

#### 16 **D. Husband's Testimony**

17 Finally, Keller argues the ALJ did not provide a germane reason for rejecting the  
18 written statements from her husband, Lonnie Keller ("Mr. Keller"). Dkt. 15 at 9–10. Lay  
19 witness testimony regarding a claimant's symptoms "is competent evidence that an ALJ  
20 must take into account," unless the ALJ "expressly determines to disregard such  
21 testimony and gives reasons germane to each witness for doing so." *Lewis v. Apfel*, 236  
22 F.3d 503, 511 (9th Cir. 2001). In rejecting lay testimony, the ALJ need not cite to the

1 specific record as long as “arguably germane reasons” for dismissing the testimony are  
2 noted and substantial evidence supports the ALJ’s decision. *Id.* at 512.

3 Mr. Keller provided two written statements in August 2011 and March 2013. AR  
4 248–55, 308–10. In both statements, Mr. Keller reported his wife needed to constantly  
5 change positions and lie down throughout the day. AR 248, 252, 308. The ALJ rejected  
6 Mr. Keller’s statements because they were inconsistent with the medical evidence in the  
7 record. AR 39–40. Inconsistency with medical evidence is a germane reason for  
8 discrediting the testimony of a lay witness. *Bayliss*, 427 F.3d at 1218. Although the ALJ  
9 did not repeat her discussion of the medical evidence when addressing Mr. Keller’s  
10 statements, AR 39–40, the ALJ discussed the medical evidence at length earlier in her  
11 decision. *See* AR 33–39. Because substantial evidence supports the ALJ’s finding, the  
12 Court concludes the ALJ did not err.

13 Even if the ALJ erred in discounting Mr. Keller’s statements, the error was  
14 harmless. Mr. Keller did not describe any limitations beyond those described by Keller.  
15 *Compare* AR 83 & 87, with AR 248–55 & 308–09. As discussed above, the ALJ  
16 provided clear and convincing reasons for rejecting Keller’s testimony about her  
17 limitations. Because Mr. Keller’s statements do not alter the ultimate nondisability  
18 determination, the ALJ’s error was harmless. *See Molina*, 674 F.3d at 1122 (“Because  
19 the ALJ had validly rejected all the limitations described by the lay witnesses in  
20 discussing [the claimant’s] testimony . . . the ALJ’s failure to give specific witness-by-  
21 witness reasons for rejecting the lay testimony did not alter the ultimate nondisability  
22 determination. Accordingly, the ALJ’s error was harmless.”).

1 **E. Residual Functional Capacity**

2 Finally, Keller argues the ALJ's residual functional capacity determination is  
3 erroneous based on the errors asserted above. Dkt. 15 at 11–12. Because this argument  
4 depends on Keller's other assertions of error, the Court concludes the ALJ did not err in  
5 evaluating Keller's residual functional capacity.

6 **VIII. ORDER**

7 Therefore, it is hereby **ORDERED** that the Commissioner's final decision  
8 denying Keller disability benefits is **AFFIRMED**.

9 Dated this 10th day of December, 2015.

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12 BENJAMIN H. SETTLE  
13 United States District Judge  
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